



U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Robert Dole
Office of the Majority Leader
The Capitol, Room S230
Washington, D.C. 20510

Dear Mr. Leader:

This letter is to inform you that the Department of Justice opposes the enactment of S. 1815, the Polygraph Protection Act of 1985, and its companion bill in the House of Representatives, H.R. 1524. This bill, which in general would prohibit private sector employers from administering polygraph examinations to employees or prospective employees, violates two of the basic policies of the Administration: (1) generally relying on the market to fix the terms and conditions of private economic behavior and, (2) whenever possible, relying on state rather than federal regulation. Because of our strong commitment to those policies, the Justice Department will recommend to the President that he veto this bill if passed by the Congress.

1. S. 1815 Violates Free Market Principles

The Justice Department knows of no compelling reason why the federal government, or any level of government, should challenge an employer's judgments on the credibility of employees or prospective employees, however determined, absent some proof of impermissible discrimination. S. 1815, itself, explicitly recognizes the usefulness of polygraphs for the government by continuing to allow polygraph testing of all government employees. Certainly if the machines are reliable indicators of truth or falsity in the public sector they are equally reliable in the private sector. Moreover, H.R. 1524 explicitly recognizes the usefulness of polygraphs in a variety of private sector contexts: as it passed the House, that bill contains exemptions for companies involved in the storage, distribution, or sale of controlled substances, workers in nursing homes and children's day-care centers, security personnel, and public utilities. Not only do these exemptions highlight the fact that the very representatives who voted to bar polygraphs recognize their usefulness in certain contexts, these exemptions also highlight

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the arbitrary nature of decisions on which occupations to exempt. For example, if polygraphs provide benefits to employers in the armored car industry, it is difficult, if not impossible, to understand why banks, where 84% of losses are attributed to employee theft, are not entitled to the same benefits.

2. S. 1815 Violates Principles Federalism

In addition, assuming that polygraphs are abused by private employers (certainly, such abuse is possible) and some government regulation of polygraphs is required, that regulation should take place at the state rather than the federal level. Important principles of federalism require us to oppose federal government intervention in matters that traditionally have been the responsibility of the states where there is no evidence of an overriding need for national policy uniformity. Until now, regulating polygraph use has been the responsibility of the states; in fact, thirty-four states and the District of Columbia have enacted statutes regulating the use of polygraph or other "honesty" tests or polygraph examiners. It is the states that are charged with protecting the health, safety, and welfare of their citizens. They uniquely possess the resources and competence to discern the conditions, needs, and desires of their citizens on these issues and to enact laws to address those concerns. To preempt the states in this context would do violence to an important underlying principle of our union -- the belief in the ability and responsibility of the states generally to govern the affairs of their citizens.

Polygraph regulation is a complex and emotional issue which poses a number of questions with no definitive answers. Even the scientific community's debate on the validity of the tests continues to be ongoing and vigorous. Polygraph regulation is an issue that requires careful balancing of the interests of consumers, employees, and employers, making it precisely the type of issue in which a diversity of responses, providing alternative solutions to differing situations and ensuring the ability to experiment with various approaches, is particularly appropriate. Possible responses range from relying on the free market, to licensing polygraph examiners, to banning completely the use of polygraphs. While all sorts of variations on these approaches are possible, which precise approach is best for any given state should be left to the citizens of that state. We see no reason to obviate the vigorous debate on the issue continuing to take place within the states.

Conclusion

For the above mentioned reasons, the Department of Justice opposes enactment of S. 1815 and, if that bill passes Congress, will recommend that the President veto it.

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The Office of Management and Budget advises us that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

John R. Bolton
Assistant Attorney General